



Before: Judge Francis Belle

Registry: New York

Registrar: Morten Michelsen, Officer-in-Charge

KAMARA-JOYNER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Lucienne Pierre, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Ombudsman and Mediation Services (“UNOMS”), contests the decisions (“contested decisions”) to:
 - a. Deny her the opportunity to perform assigned work and to issue her a written reprimand, and
 - b. Not to renew her fixed-term appointment beyond its expiration on 31 August 2021.

Facts

2. In September 2004, the Applicant joined UNOMS where she served in several positions. At the time of her separation from service on 31 August 2021, she served as a Conflict Resolution Officer (P-4 level) at UNOMS.
3. The Applicant was also a founding member and acted as President of the United Nations People of African Descent (“UNPAD”), an *ad hoc* special interest group created in 2016 by staff members of the UN Secretariat, the UN Funds and Programmes and Specialized Agencies with the stated goal of identifying, examining, and resolving issues relating to conditions of work pertaining to staff members of African descent in the United Nations.
4. In October 2019, a staff member requested UNOMS’s assistance with a workplace concern. In the absence of the New York Regional Ombudsman, the case was assigned to the Applicant.
5. On 7 October 2019, the Applicant emailed the Assistant Secretary-General for Human Resources advocating on behalf of the above-mentioned staff member. On 8 October 2019, she also emailed other senior UN Officials advocating on behalf of the same staff member.
6. On 22 October 2019, the Ombudsman verbally informed the Applicant that she could not concurrently serve as Conflict Resolution Officer in UNOMS and hold a leadership position with UNPAD because of a conflict of interest.

7. By email of 24 October 2019, the Ombudsman followed up on her previous verbal communication and informed the Applicant that her role as President of UNPAD undermined the neutrality and independence of UNOMS. The Ombudsman requested the Applicant to confirm that she would immediately step down from any leadership role and active participation with UNPAD.

8. On 4 November 2019, the Director of the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”), informed the Ombudsman that the Applicant was, as a Conflict Resolution Officer in UNOMS, requesting sensitive medical information in relation to the staff member she had previously advocated for. He requested confirmation on whether the Applicant was the correct person for him to be engaged with in this matter.

9. On 5 November 2019, the Ombudsman informed the Director, DHMOSH, that the Applicant was not acting on UNOMS’s behalf and had no authority or standing to discuss such private sensitive issues.

10. On 6 December 2019, the Applicant, *inter alia*, verbally requested the Ombudsman to allow her time to work on UNPAD to get it recognized by the Secretary-General and that she would step down as President once UNPAD was recognized. The Ombudsman informed the Applicant that this was not possible.

11. From 1 April 2020 to 31 March 2021, the Applicant was on a temporary assignment as a Legal Advisor with the Economic Commission for Africa (“ECA”).

12. On 8 March 2021, the Ombudsman contacted the Director, United Nations Ethics Office, requesting an opinion on whether the Applicant’s service as President of UNPAD represented a conflict of interest with her duties as a Conflict Resolution Specialist in UNOMS.

13. On 12 March 2021, the Director, United Nations Ethics Office, responded that the Applicant’s engagement as President of UNPAD while serving as a Conflict Resolution Officer at UNOMS gave rise to a situation of conflict of interest.

14. By email of 23 April 2021, the Ombudsman, *inter alia*, requested the Applicant to inform her about the nature of her engagement with UNPAD, that is, whether she was still serving as President of UNPAD and/or holding any other office with UNPAD.

15. By email of 28 April 2021, the Ombudsman requested the Applicant to clarify whether she was still the President of UNPAD. The Ombudsman referred to a conversation that she held with the Applicant the previous day, based on which the Ombudsman understood that the Applicant continued to serve as the President of UNPAD and did not intend to step down. The Ombudsman specifically indicated:

If I am wrong or misunderstood please let me know in writing by COB Friday, April 30th. In the absence of any clarity on your part, in writing, I will have to proceed to take the administrative actions that I deem appropriate.

16. By email of 30 April 2021, the Ombudsman referred to her email of 28 April 2021 and indicated that it had been made clear that the Applicant's role as President of UNPAD was in a conflict of interest with her responsibilities as Conflict Resolution Officer and that, under such circumstances, the Applicant could not be assigned any work with UNOMS.

17. On 12 May 2021, the Ombudsman issued a written reprimand to the Applicant.

18. By email of 16 June 2021, the Applicant was informed of the decision not to renew her fixed-term appointment beyond its expiration on 31 August 2021. Upon her request, the Applicant was informed of the grounds for such decision, namely, a conflict of interest between her role as President of UNPAD and her position as Conflict Resolution Officer, which requires neutrality as per the mandate of the Office of the Ombudsman. It was also noted that due to that conflict of interest, the Ombudsman had not assigned her any work related to conflict resolution.

19. On 29 June 2021, the Applicant requested management evaluation of the decisions "to deny [her] the opportunity to perform her assigned work and the issuance of an unwarranted letter of reprimand".

20. On 10 August 2021, the Applicant filed a complaint of harassment with the Office of Internal Oversight Services (“OIOS”) against the Ombudsman pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).

21. On 16 August 2021, the Applicant requested management evaluation of the decision not to renew her fixed-term appointment beyond its expiry on 31 August 2021.

22. On 20 August 2021, the Applicant filed an application for suspension of action with respect to the non-renewal decision.

23. By Order No. 78 (NY/2021) of 26 August 2021, the Tribunal rejected the application for suspension of action.

24. By email of 26 August 2021, the Applicant informed the Ombudsman of her decision to resign as President of UNPAD.

25. On 3 September 2021, the Chief of the Management Evaluation Unit (“MEU”) informed the Applicant that her request for management evaluation of the non-renewal decision was time-barred and, as such, not receivable.

26. On the same day, the Under-Secretary-General for Management Strategy, Policy and Compliance informed the Applicant that she had decided to endorse the recommendation of the MEU to uphold the decision of UNOMS to issue a written reprimand and to not assign work to her pending resolution of the conflict of interest.

27. On 22 November 2021, the Applicant filed the application mentioned in para. 1 above.

28. On 22 December 2021, the Respondent filed his reply challenging, *inter alia*, the receivability of the decision not to renew the Applicant’s fixed-term appointment.

29. On 1 July 2022, the present case was assigned to the undersigned Judge.

30. On 28 July 2022, the Tribunal held a case management discussion (“CMD”) with the participation of the Applicant, her Counsel and Counsel for the Respondent.

31. By Order No. 70 (NY/2022) of 29 July 2022, the parties were instructed to file further submissions on the receivability of the challenge against the non-renewal decision.

32. On 1 August 2022, the Applicant filed comments pursuant to Order No. 70 (NY/2022).

33. On 8 August 2022, the Respondent filed his comments on the Applicant’s submission.

Consideration

The written reprimand

Scope of judicial review

34. The Tribunal has consistently ruled that the Administration has the duty to act fairly, justly, and transparently in dealing with staff members (See *Matadi et al.* 2015-UNAT-592, para. 17), and the validity of the exercise of discretionary authority is judged under the legal principles as set forth in *Sanwidi* 2010-UNAT-084, at para. 40, which provides that:

... the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

35. The Appeals Tribunal has also held that judicial review is focused on how the decision-maker reached the impugned decision, and not on the merits of the decision-maker’s decision (see *Sanwidi* 2010-UNAT-084, para. 42 and *Santos* 2014-UNAT-415, para 30).

36. In *Yasin* 2019-UNAT-915, para. 47, the Appeals Tribunal held that:

... Although the reprimand is not a disciplinary measure but an administrative one, because of its adverse impact on the concerned staff member's career, it must be warranted on the basis of reliable facts, established to the requisite standard of proof, namely that of "preponderance of evidence", and be reasoned in order for the Tribunals to have the ability to perform their judicial duty to review administrative decisions and to ensure protection of individuals, which otherwise would be compromised.

37. It is settled jurisprudence that in reviewing decisions imposing a sanction, be it disciplinary or administrative, the Tribunal's scope of review is limited to determining whether: an applicant's due process rights were respected, the facts underlying disciplinary or administrative measures were established, the established facts amount to [the alleged conduct, and the sanction was proportionate to the offence (see *Elobaid* UNDT-2017-054, para. 36, *Gharagozloo Pakkala* UNDT/2021/076, para. 12, and *Applicant* 2012-UNAT-209, para. 36).

Factual basis for the imposition of the measure

38. The Respondent claims that the Applicant has a conflict of interest that compromised UNOMS's work, and that despite clear instructions from the Ombudsman, she repeatedly took the position that she was not going to resolve the conflict of interest.

39. The Applicant alleges that staff regulation 1.2(m) and staff rule 1.2(q) refer to a personal interest that interferes with the performance of a staff member's official duties. However, in the Applicant's view there was clearly no personal interest involved but rather an interest entirely compatible with UN goals, including the Secretary-General's "Task Force on Racism".

40. Staff regulation 1.2(m) on the “[b]asic rights and obligations of staff” provides that (emphasis added):

A conflict of interest occurs when, by act or omission, a staff member’s personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant. When an actual or possible conflict of interest does arise, the conflict shall be disclosed by staff members to their head of office, mitigated by the Organization and resolved in favour of the interests of the Organization.

41. Similarly, staff rule 1.2 (q) on conflict of interest specifies that (emphasis added):

(q) *A staff member whose personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member’s status as an international civil servant shall disclose any such actual or possible interest to the head of office and, except as otherwise authorized by the Secretary-General, formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to a conflict of interest situation.*

42. The Tribunal has held that the mere perception of a conflict of interest could compromise trust in the Organization’s work and its independence and impartiality. It has also held that the perception of a staff member is not the determining factor in establishing whether there may be a conflict of interest (see *Vedel*, UNDT/2019/110, paras. 45-46).

43. UNPAD, as an *ad hoc* special interest group, advocates for issues relating to conditions of work pertaining to staff members of African descent in the United Nations.

44. As per its terms of reference, UNOMS is established as the informal component of the system of administration of justice “to make available confidential services of impartial and independent persons to address work-related issues of staff members” (see ST/SGB/2016/7 para 1.1). UNOMS is guided in its work by four core principles, namely independence, confidentiality, neutrality, and informality.

45. It appears from the information on record that the Applicant's role as President of UNPAD was on a voluntary basis whereas her official function remained that of a Conflict Resolution Officer with UNOMS. The evidence shows that, indeed, the Applicant's role at UNPAD undermined the neutrality and independence of UNOMS. The Applicant was repeatedly informed of such conflict of interest by her Supervisor but failed to take corrective action.

46. The Tribunal notes in particular that in October 2019, a staff member requested UNOMS's assistance with a workplace concern. The case was assigned to the Applicant as UNOMS Conflict Resolution Officer. However, instead of handling the case in her UNOMS official capacity, the Applicant handled the case as President of UNPAD advocating on behalf of the staff member. Her involvement is evident from the content of her emails dated 7 and 8 October 2019 referred to in para. 5 above. Furthermore, the Applicant acknowledged in her application to have dealt with the case as President of UNPAD.

47. Following this incident, the Ombudsman verbally informed the Applicant, on 22 October 2019, that she could not serve as a Conflict Resolution Officer in UNOMS and hold at the same time a leadership position with UNPAD because of a conflict of interest. In her follow-up email of 24 October 2019, the Ombudsman reiterated the existence of a conflict of interest and requested the Applicant to confirm that she would immediately step down from any leadership role and active participation with UNPAD. Further exchanges followed in December 2019 on the same subject.

48. The Tribunal notes that during the Applicant's temporary assignment with ECA from April 2020 to March 2021, the conflict of interest did not exist, and the Ombudsman did not pursue the matter.

49. However, in March 2021, upon the Ombudsman's request, the Ethics Office provided an opinion confirming the existence of a conflict of interest noting that:

... engagement as President of UNPAD (despite having laudable goals) while serving as a conflict resolution officer at UNOMS gives rise to a situation of conflict of interest. More specifically, the official duty of a UNOMS staff member to remain independent and

neutral would conflict with leading and representing UNPAD and its staff special interest, though commendable ... it is for the Head of Entity to assess whether a particular act or omission raises a potential conflict of interest. Staff are obliged to disclose even possible conflicts and to follow instructions on how to resolve the situation, including to avoid and remove the conflict or the circumstances that make it a possible conflict. A highly visible conflict of interest situation could undermine the image of UNOMS as an independent and neutral office.

50. In April 2021, the Ombudsman contacted the Applicant again requesting her to clarify whether she was still President of UNPAD. In her email of 28 April 2021, she specifically informed the Applicant of her intention to take administrative action in the absence of further clarifications in writing by 30 April 2021. There is no record of a response from the Applicant.

51. In light of the above, the Tribunal finds that the facts on which the administrative measure was based were properly established as per the applicable standard of proof, namely preponderance of evidence.

Nature of the measure applied and its proportionality

52. The Respondent claims that the reprimand decision was lawful pursuant to staff rule 10.2(b)(i) and 10.2(c). Staff rule 1.2 (a) on the basic rights and obligations of staff provides that:

... Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors.

53. Staff rule 10.2 on disciplinary measures reads as follows (emphasis added):

(a) Disciplinary measures may take one or more of the following forms only:

- (i) Written censure;
- (ii) Loss of one or more steps in grade;
- (iii) Deferment, for a specified period, of eligibility for salary increment;
- (iv) Suspension without pay for a specified period;
- (v) Fine;
- (vi) Deferment, for a specified period, of eligibility for consideration for promotion;
- (vii) Demotion with deferment, for a specified period, of eligibility for consideration for promotion;
- (viii) Separation from service, with notice or compensation in lieu of notice, notwithstanding staff rule 9.7, and with or without termination indemnity pursuant to paragraph (c) of annex III to the Staff Regulations;

(ix) Dismissal.

(b) *Measures other than those listed under staff rule 10.2 (a) shall not be considered to be disciplinary measures within the meaning of the present rule. These include, but are not limited to, the following administrative measures:*

(i) *Written or oral reprimand;*

...

(c) A staff member shall be provided with the opportunity to comment on the facts and circumstances prior to the issuance of a written or oral reprimand pursuant to subparagraph (b) (i) above.

54. It is undisputed that the Ombudsman, as the Applicant's Supervisor and the Head of UNOMS, acted within her authority in issuing a letter of reprimand. In *Gharagozloo Pakkala*, para. 30, this Tribunal held that "administrative measures can be taken in cases where a staff member's conduct does not rise to the level of misconduct, but a managerial action is nevertheless required, their function is preventive, corrective and cautionary in nature".

55. The Tribunal notes that prior to the issuance of the letter of reprimand, the Applicant was informed of the conflict of interest and given multiple opportunities to cure it and to avoid administrative action. The Applicant did not take any corrective action, and under those circumstances, the Tribunal finds that the Ombudsman's decision to issue her a written reprimand was lawful.

56. The Applicant claims that the decision to proceed with a reprimand appears tied to the secretive solicitation of an opinion from the Ethics Office and that she was never advised of this or given an opportunity by the Ethics Office to present her views or even to provide the full documentary exchanges discussing the matter.

57. The Tribunal notes that the written reprimand does not refer to the opinion of the Ethics Office and, as such, did not serve as the basis for the administrative measure. The referral to the Ethics Office was only undertaken to confirm the existing conflict of interest. Therefore, the Applicant's due process rights were not violated in this respect.

58. The Ombudsman was within her right to seek the advice of the Ethics Office and, regardless of such advice, the Applicant was required to comply with the Ombudsman's directions and instructions under staff rule 1.2(a).

59. The Applicant also argues that the written reprimand is disproportionate to the conduct alleged.

60. In *Sanwidi* 2010-UNAT-084, para. 39, the Appeals Tribunal held that (emphasis added):

... In the context of administrative law, the principle of proportionality means that an administrative action should not be more excessive than is necessary for obtaining the desired result. The requirement of proportionality is satisfied if *a course of action is reasonable, but not if the course of action is excessive*. This involves considering whether the objective of the administrative action is sufficiently important, the action is rationally connected to the objective, and the action goes beyond what is necessary to achieve the objective. This entails examining the balance struck by the decision-maker between competing considerations and priorities in deciding what action to take. However, courts also recognize that decision-makers have some latitude or margin of discretion to make legitimate choices between competing considerations and priorities in exercising their judgment about what action to take.

61. The Tribunal notes that in deciding the administrative measure to be imposed, the Ombudsman took into account the multiple exchanges on the matter, the Applicant's continued engagement with UNPAD as President, and the fact that she could not provide the Applicant with any assignment as a Conflict Resolution Officer until the conflict of interest no longer existed. Under such circumstances, the Tribunal finds that the issuance of a written reprimand was a reasonable course of action. The contested decision is therefore proportionate to the fault committed.

The Applicant's due process rights

62. The Applicant claims that her due process rights were not respected. However, the Tribunal notes that prior to the issuance of the written reprimand, the Ombudsman in her email of 28 April 2021 specifically asked the Applicant to inform her whether she was still President of UNPAD by 30 April 2021. She mentioned that in the absence of any clarity on her part, in writing, she would proceed to take the administrative actions that she deemed appropriate. There is no record of any response on the subject from the Applicant. Therefore, the Applicant's claim in this respect fails.

The denial of work

63. The Applicant argues that she was denied the opportunity to carry out the work for which she was appointed due to her involvement with UNPAD. However, this appears to have been a reasonable action under the circumstances to avoid compromising the work of the Ombudsman's Office due to a perceived conflict of interest or bias in favour of or against any racial group.

64. The Applicant was entitled to be a member of UNPAD. However, although she could express her views as a member, she could not act as an advocate for those views while carrying out the Ombudsman's Office work, nor express them in a public way that would put into question her dedication to the unbiased or neutral position of the Ombudsman's Office.

65. The Applicant also claims that upon her return to UNOMS in April 2021, the Deputy addressed the alleged conflict of interest and took mitigating measures by assigning her new functions including feedback methodology and risk response issues. However, the Ombudsman did not agree to this and reverted to her earlier request for full disassociation from UNPAD.

66. The Tribunal notes that the Deputy's email of 15 April 2021 does not provide that the new work assignment and reporting line discussed in the email were measures to mitigate a conflict of interest. Furthermore, in the Ombudsman's email of 23 April 2021, the Ombudsman informed the Applicant that the Deputy went on sick leave for the remainder of his tenure with UNOMS and clarified that the Applicant's workplan and work assignments would not be finalized until it was clarified whether she was still serving as President of UNPAD.

67. In any event, the Ombudsman was not required to create responsibilities for the Applicant that fell outside of the latter's terms of reference as a Conflict Resolution Officer within UNOMS. Therefore, given that the Applicant was informed about the conflict of interest and granted the opportunity to correct such situation, the Ombudsman's decision not to provide her with any assignment as a Conflict Resolution Officer for as long as the situation of conflict of interest remained was lawful.

The non-renewal decision

Receivability

68. The Respondent requested the Tribunal to have the receivability of the non-renewal decision decided as a preliminary matter. The Applicant did not object to such approach.

69. In accordance with art. 8 of the Statute of the United Nations Dispute Tribunal, an application is receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required. Absent a request for management evaluation, the Tribunal may not consider the merits of the case. Concurrently, staff rule 11.2(c) stipulates that:

... A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

70. Under art. 8.3 of the UNDT Statute, the Tribunal has no jurisdiction to waive the time limits for management evaluation. The Appeals Tribunal has also repeatedly and consistently held that the Dispute Tribunal has no jurisdiction to waive deadlines for management evaluation or administrative review (see *Muratore* 2012-UNAT-191, para. 38; *Christensen* 2013-UNAT-335, para. 19; *Pavicic* 2016-UNAT-619, para. 21).

71. The documentary evidence on file shows that the Applicant was informed of the decision not to renew her appointment on 16 June 2021. She submitted her request for management evaluation on Monday, 16 August 2021. The MEU rejected her request on the ground that it had been submitted outside the prescribed 60 calendar days under staff rule 11.2(c). The mandatory period ended, according to MEU, on Sunday, 15 August 2021.

72. The Tribunal notes that staff rule 11.2(c) on the filing of a management evaluation request refers to *calendar* days for the calculation of time limits. The term calendar days is not defined or qualified in the Staff Rules. Therefore, in the absence of a specific and explicit provision indicating otherwise, staff rule 11.2 should be applicable upon its plain reading. The Appeals Tribunal held in *Scott* 2012-UNAT-225 para. 3, that “when the language used in the respective disposition is plain, common and causes no comprehension problems, the text of the rule must be interpreted upon its own reading”.

73. While art. 34 of the Tribunal’s Rules of Procedure specifically provides that the time limits prescribed in said rules “[s]hall include the next working day of the Registry when the last day of the period is not a working day”, there is no similar provision in the Staff Rules applicable to the management evaluation process.

74. A clear distinction must be made with the authority of the Tribunal to interpret its own Statute and Rules of Procedure to do justice to the parties in an application before the Tribunal. In the case of a management evaluation request, the matter is out of the Tribunal’s hands.

75. Furthermore, the Applicant has not argued that there was any technical fault or mishap that would have caused the application for management evaluation to be late. Consequently, without further evidence there can be no basis for arriving at a conclusion other than that which has been argued and of which the Tribunal is persuaded. The Tribunal therefore holds that the application is not receivable in respect of the non-renewal decision.

76. The Applicant claims that the issue of receivability is *res judicata* as it had already been decided by the Tribunal in its Order No. 78 (NY/2021), which dealt with her application for suspension of action. The Tribunal found in said Order that the filing of the Applicant’s request for management evaluation on Monday, 16 August 2021, i.e., the next working day after the deadline, was timely.

77. The Tribunal recalls that a suspension of action is an interim measure not a final judgment and, as such, the principle of *res judicata* does not apply.

Conclusion

78. In view of the foregoing, the Tribunal DECIDES to reject the application.

(Signed)

Judge Francis Belle

Dated this 27th day of September 2022

Entered in the Register on this 27th day of September 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York